

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
LEGAL SERVICES DIVISION
HEARINGS UNIT

IN THE MATTER OF UNIT CLARIFICATION 9-94:

STATE OF MONTANA,)	
DEPARTMENT OF JUSTICE,)	
)	
Petitioner,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	RECOMMENDED ORDER
)	
MONTANA PUBLIC EMPLOYEES)	
ASSOCIATION,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

In the unit clarification petition of August 3, 1994, the State of Montana, Department of Justice, proposed clarification of an existing bargaining unit comprised of "...all full-time and part-time (20 hours plus per week) clerks...excluding supervisory and managerial personnel." The petitioner proposed the exclusion of three positions based on newly-assigned supervisory duties. Those positions are numbered 12600, 12735, and 12610, and are currently filled by Joyce Talbott, Fran Condon and Nick Anderson, respectively. The Montana Public Employees Association disagreed with the Employer's unit

clarification petition, and the matter subsequently proceeded to hearing.

As agreed to by the parties, a hearing in the above-entitled matter was held on January 19, 1995, in the Walt Sullivan Building, 1327 Lockey, Helena, Montana, before Gordon D. Bruce, Hearing Officer. The Petitioner, State of Montana, Department of Justice, was represented by Paula Stoll. The Respondent, Montana Public Employees Association, was represented by Carter Picotte. Section Supervisor, Justina Fyfe, was called as a witness and gave sworn testimony. Joint Exhibits J-1 through J-7 were admitted into the record without objection as were Exhibits numbered A through I.

Upon completion of the hearing, the parties agreed to the mutual and simultaneous exchange of post-hearing briefs on March 1, 1995.

II. **ISSUE**

The primary issue in this petition for unit clarification is whether Positions 12600 (Joyce Talbott, hereafter Talbott, incumbent), 12735 (Fran Condon, hereafter Condon, incumbent), and 12610 (Nick Anderson, hereafter Anderson, incumbent) should be excluded from the bargaining unit based on their supervisory responsibilities.

III. FINDINGS OF FACT

1. The three positions at issue are employed in the Driver Control Section of the Motor Vehicle Division, Department of Justice. Justina Fyfe supervises the Driver Control Section. Talbott, Condon and Anderson report directly to Fyfe and are each responsible for overseeing the work of a specialized unit (Petitioner's Exhibit A). Prior to June, 1994, these individuals served as unit leadworkers. Their supervisory responsibilities were expanded in June, 1994, to alleviate the workload of Fyfe's position.

2. The positions held by Talbott, Condon and Anderson are designated and referred to as "unit supervisor." These positions are each responsible for a work unit--Reinstatement Unit, DUI/BAC and Medical Unit, respectively. Each represents a specific area of operation within the Driver's Control Section which is under the overall supervision of Section supervisor Fyfe. (Exhibits A, B, C, D, E, F, G, H and I)

3. Subordinate employees in the above mentioned work units understand that in their respective positions, Talbott, Condon or Anderson are their immediate supervisors and these workers look upon the unit supervisors as having essentially the same supervisory authority as Fyfe. (Testimony Fyfe who is reliable and credible in all her testimony)

4. When vacancies occur within their respective units, a unit supervisor serves on a three-member hiring panel. This panel includes Fyfe and a representative from outside the section. Each member independently scores applications and structured interview responses. The hiring panel then develops a consensus choice and recommends one applicant for hire. The unit supervisor's recommendation is given weight equal to that of the other two panel members. Although Dean Roberts, the division administrator, retains final hiring authority, he has always authorized the hire of the applicant recommended through this three-member panel approach. (Testimony of Fyfe and Petitioner's Exhibits E, F, G, H and I)

5. Additionally, the unit supervisors identify, develop and conduct all the necessary training of employees within their respective work unit. This includes orientation, initial job training, and on-going training as it relates to changes in law, departmental policy and procedure. (Testimony of Fyfe and Petitioner's Exhibits E, F and G)

6. Further, the work of each unit is assigned by specialty of each desk. The unit supervisors review, inspect and monitor unit work. When fluctuations in work load occur, the unit supervisors independently determine how the duties

should be reassigned. (Testimony of Fyfe and Exhibits E, F and G)

7. All employees in the Drivers Control Section work standard hours (8 a.m.- 5 p.m., Monday through Friday). The unit supervisors, however, also have the discretionary authority to approve or deny any variations, such as flex time, annual leave, or planned sick leave. They also independently observe and appraise the performance of employees in their units and communicate their evaluations to Fyfe. Fyfe in turn produces the final written performance appraisals. (Testimony of Fyfe and Exhibits B, E, F and G)

8. The unit supervisors sign and certify the timesheets of employees within their respective work units. Their signatures appear in the area marked "supervisor's certification." (Exhibits B, C, and D)

9. The unit supervisors counsel employees within the work unit and recommend formal disciplinary action, if necessary. Fyfe recalled two occasions since June where formal disciplinary action had been taken. In each instance, she followed the recommendation of the unit supervisor. Furthermore, the unit supervisors are the first contact for employees in the grievance procedure. (Testimony of Fyfe and Exhibits E, F and G)

10. The unit supervisors are each paid a grade above the workers in their units. The change in pay grade resulted from the increased supervisory authority given these positions in June, 1994 and as reflected in the respective position descriptions. (Testimony of Fyfe and Exhibits E, F and G)

IV. CONCLUSIONS OF LAW

A. Supervisory Exclusions

1. Montana law, at 39-31-103 (c), MCA, excludes all supervisory employees from coverage by the Collective Bargaining for Public Employees law. It defines a "supervisory employee" as:

... any individual having authority in the interest of the employer to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, discipline other employees, having responsibility to direct them, to adjust their grievances, or effectively to recommend such action in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature that requires the use of independent judgment.

The definition of a supervisory employee found in the Montana statute closely resembles that found in the National Labor Relations Act. 29 U.S.C. Section 152(11)

2. Thus, in determining supervisory status, the Montana Board of Personnel Appeals (Board) has historically followed the National Labor Relations Board (NLRB) and federal court precedent (**State ex. rel. Board of Personnel Appeals v. District**

Court, 183 Mont. 233 (1977) 598 P.2d 1117, 103 LRRM 2297;
Teamsters Local No. 45 v. State ex. rel. Board of Personnel Appeals, 195 Mont. 272 (1981), 635 P.2d 1310, 110 LRRM 2012;
City of Great Falls v. Young (III), 683 P.2d 185 (1984), 119 LRRM 2682).

3. In its rulings the NLRB has held that, to be classified as a supervisor, a person need not meet all of the criteria listed in the act. In fact, the existence of any one of those criteria is sufficient to confer supervisory status, regardless of how frequently it is performed [**George C. Foss Company v. NLRB**, 752 F.2d 1407, 118 LRRM 2746, CA9 (1985)]. And, in **Walla Walla Union-Bulletin vs. NLRB**, 631 F.2d 609, 613 (9th Cir.1980), the court held that the existence or exercise of *any one* of the enumerated powers combined with "independent judgment" is sufficient to confer supervisory status, *regardless of how seldom or often* the power is exercised.

4. Moreover, like the NLRB, the Montana board considers so-called secondary indicia in determining whether an employee is a supervisor (**Montana Federation of State Employees vs. Montana Developmental Center**, Unit Determination 6-88). In Unit Determination 6-88, as in the present case, other important functions set the unit supervisors apart from their fellow

employees. Among the factors that have been regarded as weighing in favor of supervisory status are the following:

(1) the employee being designated a supervisor; (2) the fact that he is regarded by himself or others as a supervisor; (3) the exercise of privileges accorded only to supervisors; (4) attendance at instructional sessions or meetings held for supervisory personnel; (5) responsibility for a shift or phases or of operations; (6) authority to interpret or transmit employer's instructions to other employees; (7) the responsibility for inspecting the work of others; (8) instruction of other employees; (9) authority to grant or deny leave of absence to others; (10) responsibility for reporting rule infractions and keeping of time records on other employees...

[Also see **Allen-Morrison Sign Co.** 79 NLRB 903, 22 LRRM 1451 (1948)]

5. And, while it is true that the unit supervisors in the present case do not have the final authority to discharge or promote, these characteristics cannot be looked at in isolation as encouraged by Respondent. Courts have held that it is the relationship of the evaluation and disciplinary role to the whole organization that is important [**ITT Lighting Fixtures v. NLRB**, 712 F.2d 40, 45, 114 LRRM 2758 (7th Cir. 1981)]. Here, the unit supervisors exercised independent judgment as they rendered meaningful disciplinary and evaluative functions; therefore, Respondent's contentions must be rejected.

6. Clearly, a determination of whether the supervisory responsibilities assigned to these employees are routine and

clerical and carried out with or without independence requires more than a showing that a superior reviews the results of supervisory actions. Here, the unit supervisors have a significant and substantial involvement as indicated by the following "tests" utilized in identifying supervisors.

B. Driver Control Unit Supervisors

7. The record clearly reflects that the positions held by Talbott, Condon and Anderson meet a sufficient number of criteria to be designated as supervisors and to be excluded from the bargaining unit. The three positions meet several of the primary twelve tests of a supervisory employee, either directly or through "significant and substantial involvement," and they meet all but a few of the secondary tests.

The Twelve Tests -- The record establishes that Talbott, Condon, and Anderson each train unit subordinates, assign work to unit subordinates, review work performed by unit subordinates, direct unit subordinates in the performance of that work, and initiate corrective action when the work is not done correctly. The record further establishes that each of these individuals perform these duties using independent judgment and discretion.

Although the unit supervisors do not have the authority to hire and fire employees without review, this factor alone, as

before mentioned, is not dispositive of the issue whether these employees were supervisors. More importantly, the record establishes that the unit supervisors' role in hiring and disciplining subordinate employees appears comparable to that of the Section Supervisor, Justina Fyfe. Here, the unit supervisors' recommendations are given weight equal to the other two members on the panel, and the panel's recommendation is seldom if ever contradicted by the administrator's final decision.

Additionally, their involvement in initiating discipline is characteristic of first-line supervisors throughout state government (Unit Clarification 9-88, *supra*). And, the record reflects that Talbott, Condon and Anderson are given authority to initiate informal disciplinary measures. When those measures fail, their recommendations for formal disciplinary actions are given significant weight.

The Secondary Tests -- The record establishes that Talbott, Condon, and Anderson oversee the work of specialized work units. In addition to the responsibilities mentioned above, the record established that these individuals approve and deny leave requests for unit subordinates, maintain and certify time records for each of the employees, and are paid more than unit subordinates based on their supervisory duties. Again, the

record establishes that these individuals are solely responsible for the performance of duties. Their involvement requires the use of independent judgment. It is far more than routine or clerical in nature.

8. Notwithstanding the fact that these unit supervisors do not have final authority, and that there appears to be a disproportionate number of supervisors in the Driver Control Section, the relevant consideration is effective recommendation or control rather than final authority. Furthermore, even though these unit supervisors may spend a substantial portion of their time in production work, consistent with the concern for divided loyalty, the NLRB has ruled in similar cases that such workers should be excluded from the bargaining unit if they have considerable authority over the employees under them.

[**Operating Engineers, Local 478**, 283 NLRB No. 114, 125 LRRM 1068, (1987)]

9. Clearly, the unit supervisors in question possess most of the primary and secondary "authorities" as shown above, and the Petitioner has met its burden of proof in this matter. Moreover, this result appears consistent with the underlying policies of the NLRB and the Board pursuant to the following:

[The] exclusion of supervisors from the protections of the Act and from bargaining units was designed in part to protect employees from supervisor influence within the union's

organization. If supervisors were members of and active in the union which represented the employees they supervised, it could be possible for the supervisors to obtain and retain positions of power in the union by reason of their authority over their fellow union members while working on the job. [**Local 636, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada**, 287 F.2d 354, 360-361, 47 LRRM 2457 (D.C. Cir. 1961)]

V. **RECOMMENDED ORDER**

The bargaining unit at the Department of Justice, Motor Vehicle Division, which is represented by the Montana Public Employees Association is hereinafter modified to exclude Positions 12600, 12735, and 12610, currently filled by Joyce Talbott, Fran Condon and Nick Anderson, respectively.

* * * * *

NOTICE: Pursuant to ARM 24.26.215(2), the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than _____. This time period includes the 20 days provided for in ARM 24.26.215(2), and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P. O. Box 6518
Helena, MT 59604

Entered and dated this _____ day of May, 1995.

Gordon D. Bruce
Hearing Officer

* * * * *

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Carter Picotte
Staff Attorney
Montana Public Employees Association
P.O. Box 5600
Helena, MT 59604

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day, served upon the following parties or such parties' attorneys of record by means of the State of Montana's Deadhead mail service.

Paula Stoll, Labor Relations Specialist
Department of Administration
Mitchell Building, Room 130
Helena, MT 59620

DATED this _____ day of May, 1995.
